Supreme Court, U.S.
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No. 95-1700

In The

Supreme Court of the United States

October Term, 1995

VIRGINIA ESPINOSA GUERRERO
and MARCOS GUERRERO,

Petitioners,

vs.

WILLIAM CUMMINGS
and CITY OF NYSSA,

Respondents.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION RESTATED

This Court has already held that offers of judgment, made pursuant to Federal Rule of Procedure 68, are appropriate in civil rights cases, including those seeking recovery under 42 U.S.C. § 1988.

The district court and the Ninth Circuit both held that the Rule 68 offers made and accepted in this case, by their clear terms, prohibited recovery of fees, incurred for any reason, after the offers of judgment.

QUESTIONS:

1. Whether this Court should grant certiorari when the petitioners have failed to identify any conflict between circuits or any important question of federal law and where petitioners are only challenging a discretionary ruling by the district court?

2. Whether a party is allowed to ignore the terms of an accepted Rule 68 offer and attempt to recover fees incurred after the offer was accepted, when the terms of the offer were clear and unambiguous?

PARTIES TO THE PROCEEDING

Petitioners Virginia Espinosa Guerrero and Marcos Guerrero ("petitioners") were the plaintiffs and appellants below.

William Cummings and the City of Nyssa ("respondents") were the defendants and appellees below.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

Respondents' offers of judgment, petitioners' acceptances and Judgments entered by the District Court for the District of Oregon are reprinted at Petitioner's Appendix 15-26.[1]

The Findings and Recommendations of the Magistrate Judge are reprinted at Pet. App. 27-32. The Order of the district court affirming the Magistrate's Findings is reprinted at Pet. App. 33-34.

The Order denying petitioners' Motion to Reconsider is reprinted at Pet. App. 35-36.

The Order submitting petitioners' appeal without oral argument to the United States Court of Appeals for the Ninth Circuit is reprinted at Pet. App. 13. The Ninth Circuit's Order denying petitioners' Motion to Reconsider is reprinted at Pet. App. 14.

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 70 F.3d 1111 (9th Cir. 1995). It is reprinted and attached to petitioners' Petition for Writ of Certiorari at Pet. App. 1-10.

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[1] Petitioners' Appendix is hereinafter abbreviated as "Pet. App."

The Ninth Circuit's Order denying petitioners' Petition for Rehearing/Suggestion of Rehearing en banc is not reported, but is reprinted at Pet. App. 11-12.

STATEMENT OF THE CASE

To the extent respondents' Statement of the Case differs from petitioners', respondents respectfully request the Court consider such differences as perceived misstatements of fact in the petition pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States.

The underlying action in this case alleged civil rights violations actionable under 42 U.S.C. § 1983. Relevant on appeal are offers of judgment made and accepted by each petitioner pursuant to Federal Rule of Civil Procedure 68 ("Rule 68").

On June 10, 1993, respondents tendered offers of judgment to the individual petitioners which provided in relevant part:

> Pursuant to FRCP 68, defendants hereby allow judgement to be given against them in favor of plaintiff, Marcos Albert Guerrero, for a total of FIVE THOUSAND AND NO/100 DOLLARS ($5,000), *plus reasonable attorney fees and costs incurred by this plaintiff prior to the date of this offer in an amount to be set by the Court.*

Pet. App. 18-19 (emphasis added). The offer of judgment made to petitioner Virginia Guerrero differed only in the amount ($1,500); otherwise, all operative language was identical. Pet. App. 15-16.

Each petitioner accepted their respective offers June 16, 1993. Pet. App. 15-20. Judgement was entered in favor of the petitioners on June 21, 1993. Pet. App. 25-26.

Petitioners provided respondents with a copy of their attorney's billing records. Ninth Circuit Excerpted Record ("E.R." 20-21). Respondents deferred to the court for determination of the amount of fees and costs incurred in accordance with the terms of the offers. Pet. App. 15-19; E.R. 15, 20.

Petitioners' attorneys submitted a cost and attorney fee bill to the district court on July 20, 1993, along with a nine-page memorandum, attached exhibits, and a request for oral argument. E.R. 13-21. Petitioners submitted their first supplemental petition for attorney fees on July 23, 1993, along with an attached exhibit. Supplemental Ninth Circuit Excerpted Record ("Supp. E.R.") 19-29. The supplemental petition included over sixteen hours of time expended in creating the costs and attorney fee petition itself. Petitioners' attorneys claimed they were entitled to a total of $3,260.00 for time incurred after respondents' Rule 68 offers. E.R. 58.

Respondents opposed petitioners' second attorney fee bill by memorandum and affidavit filed July 29, 1993. E.R. 32-38. At issue were the amount of time spent before the offer of judgment, the hourly rate demanded, and the fees demanded for post-offer work, including time spent preparing the cost bill. E.R. 32-38.

Petitioners filed yet another supplemental fee petition on July 30, 1993. Supp. E.R. 15-18. At the same time, they submitted a sixteen page reply regarding the fee petition. E.R. 39-54.